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October Term, 1965

No. 505

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,
Petitioner,

v.

HALDRED OVERSTREET

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Georgia (R. 94-117) affirming and modifying the judgment of the trial court is reported at 221 Ga. 16, 142 S. E. 2d 816 (1965). The order of the Georgia Supreme Court denying defendants' motion for a rehearing (R. 120) is not reported.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on April 20, 1965 (R. 117). A motion for rehearing was denied on May 7, 1965 (R. 120). An extension of time until August 30, 1965, to file a petition for writ of certiorari was granted by Mr. Justice Black on July 30, 1965 (R. 120-121). Petition for writ of certiorari was filed on August 30, 1965, and certiorari was granted on December 6, 1965 (R. 121).

Question Presented

Whether petitioner National Association for the Advancement of Colored People, a New York corporation, has been deprived of its property without due process of law under the Fourteenth Amendment by being held liable in damages for acts performed without its knowledge and by persons beyond its control?

Statement

A. Prior Proceedings

Petitioner is the National Association for the Advancement of Colored People, a New York corporation (hereinafter called NAACP). It was tried with the Savannah Branch of the NAACP, two officers of the Savannah Branch individually, and the Georgia State Conference of NAACP Branches in November, 1963, in the Superior Court of Chatham County, in the State of Georgia, on a petition alleging conspiracy to destroy respondent's business by picketing his premises and inducing others to refrain from patronizing his establishment. The petition sought a temporary and permanent restraining order as well as compensatory and punitive damages. A temporary restraining order, entered on June 22, 1962, was made permanent by the jury after trial. The jury also awarded damages as against all of the original defendants in the amount of $85,793.05, consisting of $35,793.05 compensatory and $50,000 punitive damages. Thereafter, defendants filed a motion for a new trial based upon general grounds and on April 20, 1964 (additional time having previously been allowed by the trial court), twenty-four specific grounds were enumerated in an amendment to the original motion for a new trial. This motion was denied by the trial court on October 2, 1964. On appeal to the Supreme Court of Georgia, the clerk of that court by letter dated February 11, 1965, requested respondent to furnish supplementary

briefs on the liability of petitioner NAACP and Georgia State Conference of Branches and on the damage award (letter printed herein in Appendix). Thereafter, on April 20, 1965, that court affirmed the judgment as against two officers of the Savannah Branch, Mr. W. W. Law and Rev. F. D. Jaudon; the Savannah Branch of the NAACP; and the national office of the NAACP. It reversed as to the Georgia State Conference of Branches. Defendants' motion for a rehearing was denied by order dated May 7, 1965, and certain portions of the original opinion were rewritten but remained dated April 20, 1965. Mr. Justice Black granted petitioner's motion for an extension of time to file a petition for writ of certiorari until August 30, 1965. Certiorari was granted as to Question 2 in the petition on December 6, 1965.

B. Evidence Presented

Petitioner is a New York corporation. Mr. W. W. Law is a resident of Chatham County, Georgia, and President of the Savannah Branch of the NAACP and the Georgia State Conference of Branches, NAACP, both of which are unincorporated bodies (R. 51). Reverend F. D. Jaudon is First Vice President of the Savannah Branch, NAACP (R. 52). Respondent is the owner and operator of a retail open-air market located in a Negro residential area in Savannah.

On May 30, 1962, Robert Lee Bolton, a Negro boy of fourteen and respondent's only Negro employee, reported to the principal of his school and to his mother that he had just been physically assaulted by respondent who had falsely accused him of stealing merchandise from the market and had hit and kicked him in his head, stomach and back. The boy reported that respondent was intoxicated at the time of this incident. A complaint of assault against respondent was immediately lodged with the Savannah police by young Bolton. When the boy and a white

police officer went to respondent's premises to serve the warrant, they found him asleep in his chair, and the officer supported the boy's contention that his employer appeared to have been drinking. Young Bolton's injuries required his hospitalization for a period of forty-eight hours and the physician who examined and treated him at the hospital testified that he was in a condition of shock, with head swelling and stomach and back tenderness and pain. Bolton's mother testified that after she had taken her son to the hospital and returned home, she received several threatening telephone calls and that when local police failed to respond to her request for help, she contacted the Savannah Branch, NAACP.

Mr. W. W. Law testified that as a result of Mrs. Bolton's request for help, a meeting of the Savannah Branch was called for the next night, at which it was determined to organize a campaign to withhold patronage from respondent because of his assault on the young Negro boy (R. 52-53). He further testified that in order to effectuate this plan, it was decided to place two pickets on each corner of the street surrounding respondent's market to advise all potential customers that the pickets were not buying there because respondent had mistreated a Negro employee, and to request them also to withhold their patronage. The pickets were instructed to act in a courteous and orderly manner.

On the following day, pickets were stationed in accordance with this plan and the picketing continued until June 22, 1962, when the temporary injunction prohibiting their presence was entered.

Respondent testified that he at no time assaulted young Bolton, but had discharged him because he stole food. He claimed that the picketing of his premises had seriously injured his business because it resulted in the refusal of patrons to enter his store. It was respondent's contention that this refusal was based upon fear caused by the con-

gregation of persons in large numbers blocking the entrance to his market, threatening his employees and intimidating his customers. However, respondent did not present any evidence that the Savannah Branch, its officers and members, or the NAACP had engaged in or authorized the actions alleged or that they were physically present when they allegedly occurred. The only evidence connected with the Savannah Branch or its officers and members indicated that their behavior was entirely lawful (R. 55-58).

Both at the close of respondent's case, and at the conclusion of its own, petitioner made a motion to dismiss the petition for non-suit arguing that respondent had failed to prove any connection between petitioner and the illegal conduct which allegedly was the cause of his damage and that there was no proof that W. W. Law was an agent of petitioner or that any agent of petitioner had damaged respondent (R. 30). The motion was denied and the court proceeded to charge the jury that conspiracy and agency were inseparable in this case (R. 78); that it could find an illegal conspiracy among all defendants on the basis of the evidence introduced as to the Savannah Branch meeting, if it determined that the Branch members had not been justified in planning and executing a selective buying campaign because of an "individual altercation" between respondent and his young clerk (R. 78-79); that the jury could not view the picketing as constitutionally protected unless it found petitioner's version of the incident involving young Bolton to be true (R. 82-83); and that if the jury found the "mere presence" of the pickets had incited others unconnected with petitioners to illegal activity which harmed respondent, this would constitute sufficient evidence to hold petitioners legally responsible for respondent's injuries (R. 79). The jury then retired and returned a verdict in the amount of $85,793.05 as against all the original defendants.

In defendants' subsequent motions for a new trial, in their appeal to the Georgia Supreme Court and in their motion for a rehearing to that court, they continued to urge

as grounds for reversal that the inordinately large damage award constituted an attempt to limit the right of their members to freedom of association, that the judgment constituted a denial of freedom of association and a deprivation of property without due process of law in violation of the Fourteenth Amendment (R. 43-48, 90-94, 117-119).

Summary of Argument

The finding that the NAACP participated in an illegal conspiracy to damage respondent's business by virtue of the conduct of other defendants in this case, is completely unsubstantiated by the record. The NAACP had no knowledge of the Savannah Branch's picketing at respondent's market until it was served with the petition making it a defendant in this action. It did not supervise the conduct of the Savannah Branch, nor did it have any employees there; yet the court below affirmed that the branch officers were "agents" of the National Association. A meeting held by the Savannah Branch to plan a selective buying campaign was labeled the formation of a conspiracy, and the subsequent picketing was held to be unlawful even though evidence concerning the branch and its officers showed only that customers were urged not to patronize the store. The decision below, affirming the award of $85,793.05 in damages despite the absence of any supporting evidence, violates the Fourteenth Amendment to the United States Constitution. *Thompson* v. *Louisville,* 362 U. S. 199; *Fields* v. *Fairfield,* 375 U. S. 248; *Garner* v. *Louisiana,* 368 U. S. 157.

While Georgia law generally requires considerably more evidence than is present here to hold non-profit or charitable organizations liable for the acts of their agents (*Randall Bros.* v. *Volpe,* 82 Ga. App. 427 (1950); *Montgomery* v. *Walton,* 111 Ga. 840 (1900); *Lester Book & Stationery Co.* v. *Massee,* 138 Ga. 213 (1912)), the courts below refused to apply their customary standards to pe-

titioner. This conflicts with the guarantee of equal protection afforded by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 682.

Accepted agency principles make clear that the agency relationship inheres only when the principal controls the conduct of the agent with respect to the transactions at issue. *Esmond Mills* v. *C.I.R.,* 132 F.2d 753 (1st Cir. 1943), *cert. denied,* 319 U. S. 770. Considerable control can be found in the power of a corporation over its subsidiary; the parent may elect directors, make by-laws, increase or decrease capital stock Yet these factors do not in themselves create liability on the part of the corporation for the subsidiary's acts. *Cf. Stevens* v. *Roscoe Turner Aeronautical Corp.,* 324 F.2d 157 (7th Cir. 1963); *Fisser* v. *International Bank,* 282 F.2d 231 (2nd Cir. 1960). Since the degree of control exercised by such a commercial corporation is substantially greater than that of the NAACP over the groups of volunteers which act as its branches, there is no rational basis for finding an agency relationship in the latter case.

The NAACP differs in its basic nature and purpose from a business organization. It establishes broad policy goals but does not and could not administer the day-to-day activities of its branches. These branches have been formed by impetus from the locality in which they function so that the members can "make more effective the expression of their own views." *NAACP* v. *Alabama,* 357 U. S. 449, 459. This is the antithesis of the finding of the Georgia Supreme Court that the branches operate "in furtherance of [the National Association's] business and interest."

Where property is taken pursuant to a suit between private parties which has been arbitrarily and capriciously decided in violation of the applicable law and the evidence adduced, the due process guarantees of the Fourteenth Amendment are vitiated. *Williams* v. *Toole,* 108 F.2d 758, 759 (5th Cir. 1940); *State to use of Maines* v. *A./S. Nye Kristianborg,* 84 F. Supp. 775, 780 (D. Md. 1949).

ARGUMENT

I. The Judgment Below Resulted From Erroneous Charges by the Trial Court and Erroneous Rulings by the Trial and Appellate Courts Rather Than Evidence.

An analysis of the transcript before this Court will show that the finding that the NAACP participated in an illegal conspiracy by virtue of the conduct of other defendants to this action, is totally unsupported by the evidence.

Since both the witnesses and the judges rarely differentiated among defendants, designation of the record in order to deal only with testimony and judicial rulings affecting petitioner NAACP has been difficult. However, the four volume record has been sifted carefully and as designated (without objection from respondent as to its content) represents each instance in which the testimony and judicial rulings appear relevant to the liability of petitioner NAACP.

Although pleadings are not evidence, both the trial court and Supreme Court of Georgia placed heavy reliance upon the fact that the amended petition alleged that Mr. Law and the Savannah Branch acted "in and for the services of the National Association for the Advancement of Colored People as its agent, employee, and servant, within the scope of said agency, employment and servic and in furtherance of the business of said corporation" (R. 13).

The broad allegations of the amended petition concerning the agency relationship of the Savannah Branch, Mr. Law, and Rev. Jaudon to petitioner are supported in the record by only seven pages of testimony. The balance, not reprinted here, deals with the alleged activities of unknown persons who gathered at respondent's place of business, and with the conflicting versions of the incident involving respondent and his Negro employee which led to the institution of picketing.

Mr. W. W. Law was the only witness on the agency question. He categorically denied any conspiracy. He testified he was President of the Savannah Branch and of the State Conference of Branches (an original defendant against whom the Georgia Supreme Court found insufficient evidence to warrant a judgment), that the Savannah Branch was a unit of the National Association with which it shared its dues, that its members automatically became members of the National Association, and that orders or counsel from the national corporation to the local branch would be in the form of workshops and discussions held at the national convention. In relation to the decision to picket, Law testified that a circular advertising the Savannah Branch meeting headed "NAACP Mass Meeting Tonight, St. Phillips Monumental AME Church . . . F. D. Jaudon, pastor, at eight o'clock" had been prepared in the Savannah Branch office and had been "a direct action of the local branch of the NAACP" (R. 53). Law explained that the Executive Committee of the Savannah Branch had ratified the decision reached at the Branch meeting to engage in a "selective buying campaign" by means of peaceful picketing. As to ratification of the action by the NAACP, he testified he had not reported to the National Association on the picketing activity of the Savannah Branch until the temporary injunction was served on it through him and that in the "normal course of business" would only have done so "as a part of our annual activities" (R. 54). When asked if the "national branch at that time approve[d] of the action that had been taken by the local branch" he aptly summed up the absence of agency between the local and national organizations by replying "I don't really believe that that entered into the situation at all" (R. 54).

During the trial, counsel on behalf of the NAACP made several unsuccessful motions seeking dismissal for failure of the respondent to present evidence establishing a cause of action as against the corporation. That respondent had

failed to establish agency, is graphically shown by the trial court's comment during argument on the motion to dismiss made at the close of respondent's case:

> . . . would the fact of affiliation alone; that is they have the same general objects and purposes, to wit, the advancement of the Negro race, would the national association then be bound by the acts of the affiliated association, they not being incorporated, and, *so far as the evidence is concerned, there being no evidence to the effect that any member was the agent of the national corporation. In other words they were just affiliated* (R. 60-61) (emphasis supplied).

In ruling on the motion the next day, the court admitted it was a "close point" but found that "the question of agency is so closely tied with the question of conspiracy that in order to be consistent with its rulings [allowing into evidence testimony on activities by non-defendants to bind defendants], the Court will have to overrule the motion for non-suit" (R. 65).

In its charge to the jury, the court evolved its unexplained and unsupported legal theory that conspiracy and agency were intertwined, stating (in the only portion of its lengthy charge dealing specifically with the liability of the corporation):

> Now did the NAACP have an agent in Savannah? Who was that agent? Was it W. W. Law? Was it the Savannah Branch . . . as an *affiliate*? Is the National Association responsible for what this *affiliate* does? . . . Are they so connected that one is responsible for the act of the other by reason of the *agency;* by reason of their concerted activities as expressed in this *conspiracy*? As the Court sees it, you can't get *agency* and *conspiracy* separated in this case. A corporation may be a member of a *conspiracy* if its officers and agents take part in it and it furthers the *conspiracy* . . . Did they [NAACP] participate through their *agents* and members and people who had a right to bind them in this *conspiracy*? (R. 78) (emphasis added).

The emphasized words indicate the complete confusion created in the jury's mind by the use of the terms "affiliate," "agency," "conspiracy" as though they were interchangeable. It was never pointed out that the jury must find agency before it could find petitioner was a member of an alleged conspiracy. Rather, the jury was told its first task was to determine whether there was a conspiracy (R. 86).

Moreover, the only reference to the unique nature of the NAACP as a corporation was made only in passing. There was no attempt to show how the difference between the NAACP and a typical commercial corporation could affect the determination of whether agency existed.

> You have heard the evidence as to the organization. It is not an ordinary business organization in that sense. It is an organization to cover certain activities, as explained on the witness stand, activities for the advancement of colored people as they contend to protect them in their constitutional rights and in their rights as citizens (R. 77-78).

Although the court did advise the jury it could find differently as to the various defendants' liability, it did not charge that it could apportion damages among them, or that punitive damages might be awarded as to one or more of the defendants but not against all. The basis of the $50,000 punitive damages award can be found in the court's charge that the jury was justified in making such an award if it found that the original defendants had maliciously instituted the picketing in order to drive respondent out of business and did not believe that respondent was guilty of mistreating his Negro employee. The judicial theory behind the granting of punitive damages against a principal for the malicious acts of his agents is the feeling that this will result in the principal punishing his agent. Here, however, the NAACP was in no position to punish the unknown perpetrators of the allegedly illegal conduct.

It should be noted that while there was a paucity of evidence presented pertaining to the question of whether Law or the Savannah Branch were agents of the NAACP, to the extent necessary to hold the latter responsible for the malicious acts of the former, there was even less evidence on the basic liability question—*i.e.*, the liability of Law and the Savannah Branch for the activities of those broadly referred to as "pickets." In only two instances were respondent's witnesses able to name those they saw at respondent's market. In one case it was Law who was said to have been present when the witness saw the pickets "calling" customers out of the store and in the other, a man identified only as "Drayton" who was "one of the main head leaders". "Because he was always there. He stayed there day and night" (R. 55-58). There was no further identification of Drayton's association with any of the defendants and his personal action was also shown to have been only urging customers not to patronize plaintiff's store.

In denying the motion for a new trial, based upon twenty-four grounds of prejudicial error alleged to have been committed during trial, the court found improper form in the ground alleging failure to show agency between Law and the Savannah Branch and the NAACP and refused to rule on it (R. 37). As a basis for denying all other grounds, essentially directed at the consideration by the jury of illegal conduct by persons not shown to be connected with the NAACP or under its control, the court relied upon the wide latitude permitted in admitting evidence in cases involving the existence of a conspiracy (R. 34-36). The testimony objected to, however, pertained not to the conspiracy, but to overt acts allegedly committed as a result of the conspiracy. Although the objections were based on lack of agency, the court applied the test of admissibility applicable to conspiracy.

On appeal, the Supreme Court of Georgia cited as supporting evidence for the verdict, the title of the circular, the failure of the NAACP to protest jurisdiction when service was effectuated on it through Law, the use by the Savannah branch of the name NAACP, the "control" exercised by the National Association through its national convention and the "holding out" of the Savannah Branch as a representative of the NAACP.

The court was also influenced by the failure of the national corporation to disaffirm the acts of the branch, holding that it had a duty to do so and having failed to exercise this duty was assumed to have ratified its acts.

The basic error made by the courts below which culminated in the decision to allow liability to fasten on the national corporation was the consistent refusal to recognize that agency and conspiracy are not the same and that in this case it was essential that agency be established before conspiracy could be found. Unless Law or the branch was shown to have had the attributes of an agent of the NAACP, it is not possible to impute their acts to the corporation since it could only have been present through Law or the Savannah Branch. It thus becomes necessary carefully to examine the evidence relied upon by the state courts as indicative of an agency relationship.

1) The heading of the circular as an "NAACP mass meeting" indicates only that the accepted nickname for the Savannah Branch was "NAACP." This also seems clear from repeated use of the term "NAACP" by Law, the court, other witnesses and respondent's own counsel when reference clearly was to the branch. The full title of the branch is somewhat cumbersome for a catchy headline to a circular or for conversation. Such abbreviated names used with reference to local branches and affiliates

of national organizations abound.[1] They do not establish the relationship between the entities referred to in a sense sufficient to fix legal liability unless it can be established that a third person relied upon such similarity in name to his detriment. Since respondent's own verified petition alleges the meeting was called by the NAACP *and* the Savannah Branch, although there was no mention of the *branch* in the circular, it is obvious that the circular did not mislead respondent as to the sponsorship of the meeting. Indeed, the issuance of the circular was termed by counsel for respondent, as a "direct action of the local unit", thus indicating that the wording of the circular (which together with the use of a common name appears to be the only evidence available to support the state supreme court's conclusion that the Savannah Branch "held itself out" to be the representative of the national corporation) is inadequate to support such a sweeping finding. Aside from the fact that respondent's own petition indicates an absence of reliance on this alleged "holding out", his injuries here were in no way affected by the relationship of petitioner to the picketing. Respondent's damage was said to result from an atmosphere of lawlessness created by the presence of the pickets. It was thus far removed from the NAACP.

2. The failure of the national corporation to contest jurisdiction of the court and rather to defend the suit on its merits was deemed by the appellate court to support the jury's finding that Law was petitioner's agent. Validity of service of process upon a corporation is not germane

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[1] For example, when a television network identifies itself as "CBS" or "NBC" it does not add that it is the New York unit of that network; when one says he is a "Mason" he does not hasten to add what local lodge; identification as a "Democrat" or "Republican" does not necessarily involve the full name of the local political club. Circulars addressed to members of such local affiliates do not necessarily describe which branch is holding a stated event—the address alone is enough to advise the recipients of the circular that it is a locally sponsored affair.

to the question of establishing agency for the purpose of corporate liability. In any event, the NAACP did deny jurisdiction over it in its answer to the original petition and by its general demurrer to the petition. Throughout the trial, it never abandoned its contention that respondent had failed to establish agency.

3. The issue of ratification is irrelevant unless we assume that the local was petitioner's agent for the purpose of being held liable for its illegal acts. However, since the NAACP steadfastly denied that Law or the branch was its agent for any purpose, a need to disaffirm is not germane. Moreover, ratification or disapproval cannot be relevant until knowledge is established. The first notice the corporation had of the entire incident came with service of the petition and temporary restraining order on Law. All it had was the word of respondent as alleged in the petition, that an NAACP branch and local officers had taken certain action. The branch, however, argued that these allegations were untrue, that it had been peacefully picketing in a lawful exercise of its constitutional rights and was in no way involved with alleged illegal acts committed by unidentified persons. Thus, in order to take any position at all on the activities of the branch, it would have been necessary for the NAACP to accept without question the word of respondent—clearly not an impartial party. Thus, so far as petitioner was concerned, the local branch had committed no illegal acts and there was nothing in the situation requiring it to express disapproval.

Finally, ratification of illegal acts is appropriate only when the acts were committed in furtherance of the principal's business. It is strained argument to say that the NAACP stood to gain by Law's allegedly illegal acts. There is no analogy to situations where, for example, a collection agency may be said to gain from its employee's

overly zealous and perhaps felonious methods in pursuing delinquent accounts.

4. Evidence of connection between the Savannah Branch and NAACP was limited to the finding that the local affiliate has as part of its name the national association's initials, shares common broad goals with the national organization which are articulated at annual conventions, and that it shares a portion of its dues with that organization. The Georgia courts found this inconclusive evidence sufficient to support the trial court finding that "the locals are within the framework of the national organization and are used in furtherance of the latter's business and interest." (R.107). The Georgia Supreme Court cited the applicable statutory requirements to establish agency as follows:

> The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf. (R.107).

However, there was no evidence here at all concerning the national's activities. Law testified as an officer of the local association and indicated in answer to all questions that the picketing had been purely *local* activity in which the national corporation was not, and under their relationship would not, be involved in any way—even insofar as knowing about it. There was no evidence adduced to contradict this view.

No questions were asked and there is no evidence on the record to show whether the national corporation had any control over the activities of its branches, whether Law was a paid employee of the national (or even of the local), what financial arrangements were between the national office and the local branches (who paid the rent, who signed the checks, etc.).

The statutory and case law cited by respondent and the courts below pertains to agents in the commercial

sense—that is, employees who are paid by the national corporation, whose activities are controlled by the national corporation and whose work is directly attributable to the economic interests of the corporation. None of these factors are, as a matter of fact, present here, and none of them were elicited by respondent for the record despite its duty to meet the burden of proof on these issues.

Thus the decision below, like those in *Thompson* v. *Louisville,* 362 U. S. 199, *Fields* v. *Fairfield,* 375 U. S. 248, and *Garner* v. *Louisiana,* 368 U. S. 157, is not sustained by the record and must be reversed as in violation of the Fourteenth Amendment.

II. The Judgment at Issue Contravenes State Law Regarding Corporations in Violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

A. Although the courts below did not consider whether agency concepts are the same where a charitable as distinguished from a commercial corporation is involved, Georgia courts have elsewhere consistently shown a different attitude toward non-profit units. Indeed, a compilation of Georgia cases in this area reveals that in almost all instances the charitable corporation has not been held liable for the unauthorized acts of persons who, in a commercial corporate context, would surely have been designated as agents. See, *e.g., Randall Bros.* v. *Volpe,* 82 Ga. App. 427 (1950) (no agency found between church and church member in charge of building work who held himself out to be an agent and advised plaintiff that church would pay for necessary building materials); *Montgomery* v. *Walton,* 111 Ga. 840 (1900) (church trustees not liable for pastor's purchase of wood); *Lester Book & Stationery Co.* v. *Massee,* 138 Ga. 213 (1912) (political campaign committee not responsible for cost of political lists prepared at behest

of staff member after campaign concluded although lists were for purpose of providing funds to pay committee debts).

Indeed, the only cases found in which non-profit institutions were held liable for the unauthorized or illegal acts of their agents involved situations where the institution was found to have elected to benefit as a result of the unauthorized acts. *E.g., Haney School-Furniture Co.* v. *Hightower Baptist Institution,* 113 Ga. 289 (1901) (use of equipment purchased by school president without authority deemed ratification).

Explicit evidence of Georgia's policy toward charitable corporations is found in a statutory provision holding voluntary agents (frequently found representing charitable groups) to a lower standard of care than paid agents (Ga. Code 4-203) and in the requirement evolved through case law that the assets held in trust by a charitable institution may not be used to satisfy judgments based upon the negligence of its agents unless it is shown that there was negligence in hiring or retaining the agent (see *e.g. Morton* v. *Savannah Hospital,* 148 Ga. 438 (1924). Although neither of these legal principles are directly involved here, they do reveal a philosophy distinctly absent from the holdings of the courts below.

It is clear that members and officers of local NAACP branches dedicated to the elimination of racial discrimination are not working for compensation, but rather because they believe in the goals of their organization. The failure of the Georgia courts to apply their customary standards to the facts of this case, is a violation of equal protection of the laws. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 682; *Cf. NAACP* v. *Alabama,* 357 U. S. 449; *Staub* v. *City of Baxley,* 355 U. S. 313; *Wright* v. *Georgia,* 373 U. S. 284; *Williams* v. *Georgia,* 349 U. S. 375; *Bouie* v. *City of Columbia,* 378 U. S. 347.

B. In addition to failing to take into consideration the difference between non-profit and commercial corporations

in agency situations, the trial court and subsequently the Georgia Supreme Court violated state law when they permitted all proffered testimony of disorderly or illegal conduct to be placed before the jury without instructions to the jury that before it was authorized to consider such testimony, it must determine whether there had been sufficient independent evidence justifying a finding that the perpetrators of these acts has been agents of any of the defendants. See *e.g., Campbell* v. *Walker,* 20 Ga. App. 88 (1917); *Arnold* v. *Adams,* 4 Ga. App. 56 (1908); *Booker* v. *Lowe,* 122 Ga. 356 (1906).

Georgia rules of evidence were further distorted by the trial court's refusal to recognize that conspiracy and agency are not the same. Both the trial and appellate courts have affirmatively stated that where conspiracy is involved in a case great latitude in establishing it is permitted, and in effect held that where proof of conspiracy requires a showing of agency similar treatment must be allowed.[2] There is no support in the law for this interpretation. It is impossible for a corporation to conspire through a person not authorized to represent it. *Liberty Mutual Insurance Company* v. *Lipscomb,* 56 Ga. App. 15 (1937).

Moreover, where the conduct involved is malicious or willful, Georgia law specifies that liability attaches to the principal only where the malicious act was performed by the agent within the scope of the corporation's business, *Plumer* v. *So. Bell Tel. & Tel. Co.,* 58 Ga. App. 622 (1938), expressly authorized, in violation of a duty that the principal owed to the plaintiff, or ratified by the principal. *Southern Railroad Co.* v. *Chambers,* 126 Ga. 404 (1906);

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[2] *Woodruff* v. *Hughes,* 2 Ga. App. 361 (1907), which was relied upon heavily as establishing the right of a party asserting conspiracy to have wide latitude in proving it, did not involve a question of conspiracy between a principal and an agent.

Heath v. *Atlanta Beer Distribution Company*, 56 Ga. App. 494 (1937).[8]

In the instant case, even if we assume *arguendo* that Law or the Savannah Branch were general agents of the NAACP, this general agency would not authorize them to act illegally. While the NAACP may as a general policy permit *peaceful* picketing as a means of advising the public of racial discrimination, there is certainly nothing in the evidence or in the generally recognized pattern of conduct of the NAACP which could justify the conclusion that the NAACP acquiesces in violence. While it it true that the Georgia Supreme Court was initially concerned with the inadequacy of proof as to the liability of petitioner, its doubts were apparently resolved by the material on this question supplied by respondent's counsel pursuant to the court's request (see Appendix). However, none of the arguments made or authorities cited by respondent on the question of NAACP liability substitute for the lack of competent evidence on this point.

Nor was agency in the instant case to be inferred from petitioner NAACP's failure to disavow the acts of the branch, which the court below found to be ratification. The court paid lip service to the requirement that an agent's unauthorized acts must be ratified by its principal before liability for these acts may attach to the principal. However, the jury was given the term "ratification" without frame of reference or definition. It was not told that knowledge sufficient to make alleged ratification meaningful

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[8] In almost all of the cases involving the liability of a principal corporation for the tortious conduct of its agents, the courts were concerned only with whether the pleadings contained the necessary allegations as set forth above, and not with whether the evidence presented supported these allegations. See, *e.g.*, *Davison-Paxon Co.* v. *Norton*, 69 Ga. App. 77 (1943). *Progressive Life Insurance Company* v. *Doster*, 98 Ga. App. 641 (1958). *Southern Grocery Stores* v. *Herring*, 63 Ga. App. 267 (1940).

". . . [m]ust have been acquired by the principal otherwise than by the knowledge of the agent, the ratification of whose act is contended for." *Hale-Georgia Minerals Corp.* v. *Hale,* 83 Ga. App. 561, 562 (1951), or that:

> It is elementary that before a principal can be bound by a ratification of the act of an agent he must at the time of ratification have full knowledge of all the material facts by which he is to be bound. *Weathers Bros. Transfer Co.* v. *Jarrell,* 72 Ga. App. 317 (1945).

Patently, it was impossible for petitioner to have "full knowledge" of facts which were and are still in dispute.

In addition, Georgia law makes it impossible for an act to be subject to ratification unless it had been done for and in behalf of the person adopting it. *Smith* v. *Pope,* 100 Ga. App. 369 (1959); *Fed. Deposit Insurance Corp.* v. *Thompson,* 54 Ga. App. 611 (1936).

In summary, in dealing with the facts in this case the courts below showed no recognition that even in the typical commercial situation, the quality and quantity of evidence required to establish an agency relationship in which liability can be attached to the principal, varies in accordance with the character of the agent's act with which the principal is sought to be charged. Rather, the state courts here held in effect that the existence of an agency relationship is static and absolute and that once that relationship is found the principal is automatically responsible for any injuries its agent may cause another. This is not Georgia law.

A further ramification in this departure from Georgia law can be seen in the finding that the NAACP was responsible for the acts of persons completely unidentified and unknown to it. This is not even a case where the alleged agent is charged with committing an illegal act. Rather, it is an instance where the alleged agent of an absent principal

is charged with encouraging others to feel licensed to commit tortious acts. The failure of the Savannah branch to disaffirm the acts of others is imputed to the national corporation. The theory behind holding a principal liable for the torts of its agents cannot be thus overextended.

III. The Decision Below Deprived Petitioner of Property in Violation of the Due Process Clause of the Fourteenth Amendment.

The $85,000 judgment against the NAACP in this case represents a complete departure from sound agency principles. In essence, the agency relationship involves the right of the principal to control the conduct of his agent with reference to matters entrusted to the agent. *Esmond Mills* v. *C.I.R.*, 132 F. 2d 753 (1st Cir., 1943), *cert. denied*, 319 U. S. 770. The court below based its finding of petitioner's liability solely on its "affiliation" with its local branch. No attempt was made to go beyond the fact of affiliation to the question of control.

That the NAACP is a corporation is not relevant to the question of control. As was said by Mr. Justice Douglas and Carrol M. Shanks in "Insulation From Liability Through Subsidiary Corporations," 39 Yale L. J. 193, 194:

> Little will be gained by seeking to ascertain what a corporation is. It is not a thing. It is a method. It defies definition when removed from the background of the purpose attempted to be accomplished and the manner of accomplishing it.

A corporation organized and operated for profit is entirely different from one purposed to advance the ends of justice. This difference in the *raison d'etre* in turn leads to differences in structure and thus in the degree of control which can be exercised over affiliates. At one end of the spectrum is the power of a corporation over a wholly-owned subsidiary. At the other end is the relationship of the NAACP

and the local groups of volunteers which function as NAACP branches. Although the commercial corporation has sufficient control through the ownership of the subsidiary's stock to elect directors, enact by-laws, increase or decrease capital stock, and some or all of the officers or directors of the two corporations may be the same, these factors alone do not necessarily render the parent liable for the torts of the subsidiary. Only if the parent treats the subsidiary as its own property as far as management and operation are concerned, or if it interferes and directly controls the transactions involved, is it held to acquire the burdens as well as the benefits of the relationship. See *e.g., Stevens* v. *Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963); *Fisser* v. *International Bank*, 282 F.2d 231 (2nd Cir. 1960); *Segall* v. *Food Fair Stores, Inc.*, 185 F. Supp. 81 (E. D. Pa. 1960); *Friedman* v. *Vandalia Railroad*, 254 Fed. 292 (8th Cir. 1916).

The parent corporation is insulated from liability if the following factors are adhered to in the structure of the two corporations: (1) Each is a separate, self-sustaining financial unit; (2) each has separate day-to-day activities; (3) each maintains separate financial records.[4] All of these factors are, of course, applicable to the relationship between the NAACP and any of its numerous branches. If the rule involving business corporations which own other corporations is predicated upon freedom from liability, even greater protection from liability should inhere in the case of the NAACP and the groups to which it permits the use of its name.

A closer analogy to the instant case is the law as it has been applied to the liability of international unions for the tortious acts of their locals. The *ratio decidendi* of *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, is instructive here. In that case both a local and an

[4] Douglas & Shanks, "Insulation From Liability Through Subsidiary Corporations," *supra*, at p. 196.

international union were held liable by the trial court for injury resulting from an unauthorized strike by the local. This Court reversed as to the international union holding at page 395:

> The argument of counsel for the plaintiffs is that, because the national body had authority to discipline district organizations, to make local strikes its own and to pay their cost, if it deemed it wise, the duty was thrust on it, when it knew a local strike was on, to superintend it and prevent its becoming lawless at its peril. We do not conceive that such responsibility is imposed on the national body.

Coronado is amplified by *Spica* v. *International Ladies Garment Workers Union*, 388 Pa. 382, 103 A. 2d 468, 479 (1957), which involved the question of whether the international was subject to service. The court stated:

> You may bring the various organizational levels into this Court, but before we shall convict any of the entities of tort, you must convince us of its own tortious conduct.

Just as the court in *United States* v. *International Union of United Mine Workers*, 89 F. Supp. 179, 181 (D. C. 1950) refused to "convict [the international union] on conjecture" for having in some way induced a mass strike of union members, so this Court should not sustain a judgment based upon the assumption that the illegality was occasioned by the NAACP.

In *Di Giorgio Fruit Corporation* v. *NLRB*, 191 F. 2d 642 (D. C. Cir 1950), *cert. denied*, 342 U. S. 869, the issue was whether a certain local of the National Farm Labor Union was subject to the jurisdiction of the National Labor Relations Act. Since the court found that the local consisted of agricultural workers who were expressly excluded from coverage the only question was whether the local was an agent of the national, which was subject to the Act. Despite

the requirement of dues splitting and use of a common name, the court at page 648 found:

> If on the evidence here present it were to be held that this local was the agent of the National it would be difficult to imagine a local member of the National which would not be such an agent.

It concluded that so to find would entail placing the local under the jurisdiction of the National Labor Relations Act, a result clearly not intended by the framers of that legislation. If in *Di Giorgio;* where the evidence showed that the national union had sent representatives for the purpose of aiding the local in conducting an organizational strike, the court could find no agency relationship between the two groups, certainly no such finding is warranted here.

As has been shown, the opinion below equates the NAACP with a commercial corporation whose affiliates are used "in furtherance of . . . [its] business and interest" (R. 107). The implication is that corporate business has been transacted for the benefit of the NAACP. This kind of analysis cannot be tailored to fit the situation shown in the record. When the Savannah Branch responded to local concern about respondent's treatment of a 14-year old employee, it was not acting for the benefit of the New York corporation. It acted in the interest of its members and the Negro community. Organizational activity of this kind ". . . is but the medium through which . . . individual members seek to make more effective the expression of their own views." *NAACP* v. *Alabama,* 357 U. S. 449, 459.

When the corporate process of establishing sub-divisions is compared with the formation of an NAACP branch, the function of the branch is illuminated and the important distinctions between these processes highlighted. A business corporation opens an office in a new geographical area by renting office space, hiring employees and setting up the operational details which will govern the transactions in which its employees are expected to engage. Conversely,

the impetus for setting up a NAACP branch comes from the locality in which it will function. Local citizens agree that they will band together to effectuate their mutual purposes and that they will ask the NAACP for permission to use the name as part of the name of their own. If the members agree with the principle of eliminating racial discrimination through peaceful and lawful means, they are accorded a charter by the NAACP. Thus they become, as this Court recognized in *NAACP* v. *Alabama*, 357 U. S. 449, 452, "chartered affiliates which are independent associations. . . ."

Any Procrustean attempt to expand the liability of the NAACP beyond the acts of its own employees and the programs which they direct must fail. There are more than 1500 NAACP branches, each of which have local programs and activities. The function of these branches is not to do business for the New York corporation but to associate for legitimate ends, which this Court has held "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society." *NAACP* v. *Button*, 371 U. S. 415, 427.

The ramifications of a decision affirming the liability of petitioner are far-reaching. The relationship between the NAACP and its branches is similar to that of a political party to local clubs. The purpose of both is to advance a social program. Both raise funds at the local level which may be used partially for national objectives. Both have a common name. In both, organizational control over affiliates is general, limited to establishment of broad policy goals rather than supervision and administration of day-to-day activities. Thus, the enunciation of a principle whereby such organizations are automatically liable for the acts of affiliates, would be destructive of the effective functioning of political parties, fraternal societies, patriotic national organizations, and similar entities.

A national political group could function within the confines of such a rule only by dispatching a supervisor to each local unit in order to oversee daily affairs. This would impose an impossible financial and structural burden upon such groups. As a practical matter, the necessity for assuming this kind of policing would drain all the personnel and funds of the national organization. It would vitiate any possibility of continuing its true function of formulating and expressing the broad policies and platforms which the local groups carry out in the context of their local problems.

An additional effect in the case of an organization such as the NAACP would be to distort the nature and therefore the purpose of the Association. The nature of the corporate petitioner is delineated in detail in *NAACP* v. *Alabama*, 357 U. S. 449. The principal objectives of the organization, a New York non-profit membership corporation, include as set forth in its certificate of incorporation:

> voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.

The historical fact of servitude, the repressive measures which followed emancipation and the ensuing and existing stigma of inferiority borne by Negroes provide both motivation and necessity for a unified effort to achieve, in fact, those civil rights long guaranteed in theory. It was not possible for the individual Negro or diverse groups of Negroes to effect any discernible change in a long enduring pattern of racial discrimination. Such changes are only possible through a national group. Thus it was that in 1911 the National Association for the Advancement of Colored People was formed.

The paramount purpose of the organization, the acquisition of equal rights for Negroes, cannot be achieved by a central office. The obstacles and impediments to racial equality in New England are dissimilar to those in the South; eradication of these obstacles and impediments requires effort at the local level by those immediately concerned. For this reason, the New York corporation can neither function nor carry out the purposes for which the organization was created without its branches. Therefore, without regard to *legal* liability, the destruction or impairment of its branches effects a mortal blow to the parent organization whose existence is posited on the eradication of racial prejudice in all areas of this country and the securing of equal rights for Negroes as *individuals*. Survival or insulation of the national corporation *sans* local units defeats the purpose of the organization. The branches represent those individuals, united by a common purpose, whose equal rights are sought to be protected and furthered. Branches are financially incapable of satisfaction of substantial money judgments from their own funds; consequently their continued existence requires payment of such judgments by the corporate petitioner. Accordingly, a *legal* lack of the corporate petitioner's responsibility, although consistent with the law, does not relieve the NAACP of restoring its branches to a position where they can function. It is elementary that a sizeable money judgment would attach to any and all funds which might be raised or acquired by the branch to further local programs. Existence of this "sword of Damocles" is more than sufficient to destroy the branch and to curtail any meaningful efforts to fight discrimination in that locality.

In this case, state action effectuated through judicial fiat purposed to remove local "civil rights agitators," is sought to be accomplished by striking at the local units. In the past, attacks upon the branch or the corporation have been purposed to suppress local activities. This

thesis is not novel to this Court. In *NAACP* v. *Alabama*, 357 U. S. 449; 377 U. S. 288, the expulsion of the corporate petitioner was a device to eliminate efforts to desegregate facilities in Alabama. Similarly, in *NAACP* v. *Button*, 371 U. S. 415, application by the State of Virginia of a barratry statute to the corporate petitioner would have successfully terminated *local* civil rights litigation in that state. Again in *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, it was the records of a branch which were sought by the state. Parenthetically, it should be noted that in all these instances the national organization came to the legal defense of the branch, an act which this Court considered neither an admission of the charges made nor creation of or participation in a conspiracy. In addition to preserving the right of freedom of association as a derivative of freedom of speech, a principle which pervades all of these cases, these decisions are of broader application. *Alabama*, *Button* and *Gibson* condemn any perversion of the law by a state which in purpose or effect stifles legitimate group activity purposed to foster and secure racial equality or to facilitate political (as opposed to partisan) expression. These decisions implicitly recognize that apparently minor and unrelated restrictions attempted through a variety of methods would, if successful, produce the same result: the paralysis and eventual impotence of the Association. Here, as in *NAACP* v. *Alabama*, 377 U. S. 288, 309, "This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas."

All rules of well-settled law demand vacation of the verdict against the corporate petitioner but such reversal results in a pyrrhic victory. The erroneous judgment against the Savannah Branch effectively accomplishes the same result as the retention of the entire decision of the court below, since continued operation of local branches is essential to the unique character of the New York corporation.

The *sine qua non* of the decision here appealed rests on an erroneous statement of the law of conspiracy and agency (R. 34-36, 65, 78). The application of unconstitutional legislation (*NAACP* v. *Button, supra; Gibson* v. *Florida Legislative Investigation Committee, supra*); and the imposition of unlawful contempt orders (*NAACP* v. *Alabama*, 357 U. S. 449) cannot be legally distinguished from erroneous and unfounded statements of "controlling" law for the guidance of a jury. A jury verdict is not sacrosanct; it must be consonant with the law as stated by the court and where that statement of the law is erroneous, the verdict must fall. See *Henry* v. *Collins*, 380 U. S. 298, where the state court judgment was reversed because erroneous instructions to a jury resulted in a charge in conflict with constitutional principles. Civil judgments based upon such errors in law represent a basic denial of fundamental due process. As this Court noted in *Stein* v. *New York*, 346 U. S. 156 at page 181:

> Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.

Petitioner does not suggest that the ambit of the First Amendment insulates any and all activity merely because it is pursued under a standard of freedom of association, or that an honest belief that the boundaries of the First Amendment encompass its acts, automatically affords protection. Rather, it is the state's erroneous application of the law upon which liability was premised, which offends petitioner's due process rights. In *Williams* v. *Toole*, 108 F.2d 758 (5th Cir. 1940), at page 759, the appropriate principle is succinctly stated:

> However, if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed

> facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment.

Similarly, in *State to use of Maines* v. *A/S Nye Kristianborg*, 84 F. Supp. 775 (D. Md. 1949), where the state had imposed liability on a vessel, irrespective of fault, the Court stated at page 780:

> It requires no elaboration to demonstrate that a statute which, as we have seen, would impair a property right, by subjecting one's property to the claims of another without personal fault or legal liability of the owner, destroys vested rights of property and is therefore clearly invalid. It is the taking of property without due process of law contrary to the Fourteenth Amendment of the Federal Constitution . . .

What a state may not constitutionally accomplish by means of a statute, it is likewise precluded from doing by misstatement of the law. *New York Times* v. *Sullivan*, 376 U. S. 254, 276. In *Sullivan* this Court recognized the inhibiting effects of unconstitutionally secured civil damage judgments. The threat and use of civil process and onerous damage verdicts is restrictive and deterrent to the exercise of associational activities and produces the "chilling effect" on these rights which this Court averted in *Dombrowski* v. *Pfister*, 380 U. S. 479.

The subsistence and effectuation of its principal purposes and objectives require the corporate petitioner, because of its structure and nature, to acknowledge and satisfy its moral obligation to relieve those individuals who constitute its branch of the onerous judgment cast upon it by the court below. While the petitioner is confident that it cannot be held liable on the facts in this record without grave infringement of basic constitutional standards, it is respectfully submitted that the judgment below has been equally violative of due process and equal protection as

to the Savannah Branch, W. W. Law and Rev. Jaudon. Survival of that unconstitutionally acquired judgment undercuts this Court's past interpretations of the Fourteenth Amendment's guarantees.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this Court should review the entire case on the merits and reverse the judgment below, not only as to petitioner, but as to the Savannah Branch, W. W. Law and Rev. F. D. Jaudon.

Respectfully submitted,

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APPENDIX

(Letterhead of)

STATE OF GEORGIA

SUPREME COURT

ATLANTA

February 11, 1965

To counsel in Case No. 22814,
National Association for the Advancement
of Colored People et al. v. Haldred Overstreet

Dear Sirs:

Today we are directed to write you as follows: It appearing that defendant in error has not submitted argument either orally or by brief on the question of responsibility or liability of the defendants, the NAACP, a New York corporation, and the Georgia State Conference of Branches, NAACP, an affiliate of the NAACP, a New York corporation, for the alleged acts of W. W. Law and F. W. Jaudon, as officers of the Savannah Branch of the NAACP and for the acts of other members of the Savannah Branch, nor upon the question of damages, actual or punitive, counsel for defendant in error are requested to aid the court in the determination of these issues by submitting argument and authorities in support of their contentions on these questions, in supplemental brief to be filed in this office on or before February 18, 1965. Counsel for plaintiff in error are allowed to file reply brief on or before February 22, 1965.

Yours very truly,

HENRY H. COBB,
Clerk.

HHC/fc
Copy to each counsel of record.